

October 2007



Medicare Opt-Out Requirement

by **Kevin D. Devaney**

Most doctors would reasonably believe that if they terminate their Medicare provider agreement, they do not have to worry about Medicare regulations any more. Not true. Doctors are not free to treat Medicare patients and bill them directly even if the physician does not have a provider agreement with Medicare. Doctors treating patients covered by Medicare should be aware that even as “non-participating” providers without active Medicare provider agreements, charge limitations for covered services still apply. If physicians or practitioners wish to enter into private contracts with their patients to provide medical services at their own private rates, they must complete a regulatory “opt-out” procedure under Section 1802 of the Social Security Act.

To opt-out of Medicare, a physician or practitioner must submit a signed written affidavit to the Medicare carrier with which he or she otherwise would file claims under Medicare. The opt-out becomes effective at the signing of the affidavit, provided it is properly filed within 10 days of signing the first private contract with a Medicare beneficiary, and remains effective for two years. Statutes and regulations set forth various disclosure requirements for the “opt-out” affidavit and private contracts. Once a provider successfully “opts out” of Medicare, the provider is generally prohibited from submitting any claims to Medicare.

Locations

Columbus Office:

100 E. Broad Street Ste. 600
Columbus, Ohio 43215
Telephone: 614-280-1770
Fax: 614-280-1777

Toledo Office:


One Seagate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: 419-241-6000
Fax: 419-247-1777

Findlay Office:

725 S. Main Street
Findlay, Ohio 45840
Telephone: 419-424-5847
Fax: 419-424-9860

Website:

www.eastmansmith.com



The ability to opt-out of Medicare is only available to medical service providers defined by regulations as “physicians” or “practitioners,” and does not include chiropractors, physical therapists and occupational therapists.

One potentially important exception to the billing restrictions on Medicare patients is for services not covered by Medicare or for which Medicare will likely reject as not being reasonable and necessary. In these instances, it is not necessary for a physician or practitioner to opt-out in order to enter into private contracts with Medicare beneficiaries to render services excluded from coverage by Medicare. When a service normally covered by Medicare is likely not to be covered in a particular case on reasonable and necessary grounds, a physician may give the beneficiary an advance beneficiary notice telling the patient in advance that the service would probably not be covered by Medicare and obtaining the patient’s agreement to pay for the service if Medicare denies the claim.

The penalties for billing Medicare patients on a private basis without going through the formal opt-out procedure are severe. A physician or practitioner who enters into a private contract with a Medicare beneficiary without opting out may be subject to a maximum civil penalty of \$10,000 per item of service under Section 1128a of the Social Security Act. Absent a showing of good faith efforts to comply, a physician or practitioner who attempts and fails to properly opt-out or maintain opt-out status may also face penalties, such as the voiding of all private contracts and the required reimbursement of charges over Medicare limits to Medicare beneficiary patients. Physicians and other practitioners thinking about terminating their Medicare provider agreements or going to a private pay model should consult a health care attorney before embarking on any course of action.

Please contact Mr. Devaney at our Toledo office (419-241-6000) for further information. Mr. Devaney is a member of the Firm in the Business Section where he practices in the areas of health care and general corporate law. A presenter at seminars on medical records, confidentiality and related topics, he is also a registered pharmacist (inactive) and has a masters in business administration.

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